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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 666.

CHARLES E. LESTER and EDWARD ANTHONY BUCCIERI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR REHEARING

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

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## PETITION FOR REHEARING

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

Charles E. Lester and Edward Anthony Buccieri pray that a re-hearing be granted on their Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-styled case on July 8, 1966.

## STATEMENT.

Petition for a Writ of Certiorari was denied by this Court on January 9, 1967. By order of Chief Justice Warren dated January 13, 1967, the issuance of the Order denying the Petition for a Writ of Certiorari was stayed pending the timely filing and disposition of a Petition for Re-hearing.

## QUESTIONS PRESENTED.

1. The Court erred in permitting, over objection of petitioner, Lester, the interrogation of him by counsel for the Government of a reprimand by a court of petitioner which occurred thirty years before date of trial, which was highly prejudicial to the rights of petitioner, and was reversible error.

2. Petitioners' substantial rights were prejudiced through the fatal error of the trial court in not properly instructing the jury on the question of the wilfulness necessary to be proven in connection with the offense denounced by § 242, Title 18, U. S. C.

## ARGUMENT.

**The Court erred in permitting, over objection of petitioner, Lester, the interrogation of him by counsel for the government of a reprimand by a court of petitioner which occurred thirty years ago.**

Over the objection of Petitioner, Charles E. Lester, the trial court permitted Government counsel during his cross-examination of Petitioner, Lester, to attack his character. The questions propounded on such cross-examination concerned a reprimand that Lester had received from a Circuit Court Judge some thirty years prior to the trial of the case. Petitioner, Lester, had not offered proof of his general character nor did he at any time do so during the trial of the case.

This error was assigned in Petitioner, Lester's, motion and grounds for a new trial, Item 13 Appellants' Appendix, page 23a, and is a substantial ground available to Petitioner although not previously presented to this Court or to the Circuit Court of Appeals as provided in Rule 58 of the Revised Rules of the Supreme Court of the United States.

Petitioner's testimony in respect to his occupation and admissions to practice law appears at Appellants' Appendix, pp. 170a-171a as follows:

"Q. What is your occupation, Mr. Lester?

A. I'm a lawyer.

Q. How long have you practiced law?

A. I was admitted to practice by examination in Kentucky, in 1926, and in Ohio, in 1927, and I have been practicing continuously since that time.

2985 Q. In which courts do you practice, Mr. Lester?

A. In the several courts of the Commonwealth of Kentucky. I don't mean in all 120 counties, but

in this general area and the courts of Southern Ohio, and the United States District Court, where we now sit, the United States District Court for the Western District of Kentucky at Louisville, the United States District Court for the Southern District of Ohio, principally in the Western Division, in Cincinnati, and Columbus, and in the United States Court of Appeals for the Sixth Circuit, that sits for Michigan, Ohio, Kentucky and Tennessee, with headquarters in Cincinnati. I am admitted to practice before the Post Office Department, the Veterans Administration, Tax Court of the United States, Interstate Commerce Commission, I've had some practice before the Internal Revenue Service and before the Supreme Court of the United States."

Petitioner Lester had not when he so testified and did not throughout this trial offer evidence respecting his character.

Over the strenuous and repeated objections of counsel for petitioner the trial court permitted the Government to attack the character of Lester as same is reflected by the record of Appellants' Appendix at pp. 197a-201a.

"**Cross-Examination**, by Mr. Joseph Cory, Special Counsel, Department of Justice.

The Court: Had you concluded, gentlemen?

Mr. Davies: Yes, Your Honor.

3028 The Court: No other questions from any of you? You may cross-examine.

Q. Did you say, Mr. Lester, that you have been in continuous practice since 1927?

A. Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the court, in the presence but out of the hearing of the jury:)

Mr. Goldfarb: Your Honor, last year we didn't bring this out. Now, we have authority for the idea that the federal court rule is you can bring in a disbarment proceeding to attack credibility. Now, we didn't do it last year because we didn't want to take the chance of possibly——

The Court: What is your authority on it?

Mr. Goldfarb: It is in 1963 April, Kansas Law Review, this man Warfield writes on federal practice. There is an article on impeaching a witness but anyway, I don't want to go into it now for that purpose. Anyhow, this man has misstated his position at the bar and I think this is just for contradicting his statement and it certainly should be allowed in.

3029 Mr. Walker: Let's find out, was he disbarred?

Mr. Goldfarb: Well, we have the world's leading expert on it right here.

Mr. Walker: Was he? He was not. He was not.

Mr. Goldfarb: The way I understand it, stop me if I am wrong, he was disbarred on seven grounds. It went up to the Court of Appeals and an affidavit of prejudice was filed, which under the Kentucky law, I am informed, automatically disqualifies an attorney. The counts were substantially sustained. The judge, I believe, sustained three or four of the seven counts and censored Mr. Lester and stated that the reason for doing it was since there had been a two or three year period where this man had been undergoing punishment, he didn't want to add——

Mr. Walker: He was never disbarred.

Mr. Goldfarb: There was a time he was disbarred, when he didn't practice.

Mr. Walker: No, he——

The Court: When was all this?

Mr. Davies: In 1928 or the early Thirties. I
3030 happened to be the Commonwealth Attorney, because Mr. Diskin was ill. Now, it didn't go

to the Court of Appeals twice. It was reversed on the grounds that Judge Caldwell should have disqualified himself.

The Court: Well, let's get back to the proposition——

Mr. Davies: Then it was assigned to Judge Newell, who ordered the reprimand. I don't know on what basis. My recollection is on three of the charges.

Mr. Walker: Reprimands aren't disbarment.

The Court: No, no, I don't think you should bring in a disbarment proceeding that was not sustained. Now, if you have some actual—you may ask him if he got a reprimand from the Court of Appeals, or from the court, you may ask him that. I will permit that, but I am not going to have it appear here that he was just before the court on a disbarment proceeding, because he is not answerable for disbarment if it was not a successful effort to get him disbarred.

Mr. Goldfarb: All right, we will confine ourselves to that.

Mr. Cory: I want to ask if there was a period during which he could not practice law.

3031 The Court: Was there a period?

Mr. Davies: No, the answer was that he superseded the judgment, but there was quite some question about whether it was a self-executing judgment or whether it wasn't or whether there was a right to supersede it, but nobody pressed it, so that during the appeal he was permitted to practice law.

The Court: Well, now, here's my ruling on this. I don't want even the word disbarment mentioned because it is unfair to this defendant. If there is something in the nature of a reprimand which was a matter of record, a matter of fact, you may inquire of it. He has testified as to his professional erudition and you have a right to attack it if you can, but not just

that there was a proceeding at the bar. Do you understand?

Mr. Goldfarb: Yes.

The Court: I think you can hold yourself within the bounds of the rules of evidence. You have a right to ask him about facts but not about something that did not materialize.

Mr. Cory: I will ask the question in the form that you suggested.

3032 Mr. Walker: Of course, if the Court please, I object to anything being asked about that. Now, for what purpose is it? To affect his credibility? Is it to show that his integrity is bad?

Mr. Goldfarb: Yes.

Mr. Walker: Is it attacking his reputation? Could it be an attack upon his character?

The Court: He has testified—I am not permitting that—it is a rebuttal of his testimony as to his professional erudition and he has a right to—if there is something affecting that, he has a right to do it, he has a right to ask about it, if it is something that is established, not something that was attempted that didn't succeed.

Mr. Walker: I don't know if I ever talked to Mr. Lester about it. May I ask him that, if he was reprimanded, so I may know?

The Court: Yes, you may in private.

Mr. Walker: May I take him back here and ask him that?

The Court: Sure, sure.

(Reporter's note: There was a pause in the proceedings while Mr. Walker and Mr. Lester retired from the court room. They returned into the court room. Mr. Lester returned to the bench and the following occurred there:)

3033 Mr. Walker: Now, if the Court please, I think I have it straight. I believe I have. This oc-

curred some 30 years ago. He said he was reprimanded by the court and gives some explanation for it. This was something that occurred at least 30 years ago and, of course, I object to any reference being made to it. It is too remote and has no relationship to this proceeding whatsoever or to him at this moment.

The Court: I am going to permit you to ask those questions under that limitation and I don't want you to use the word disbarment and I don't want you to ask anything that has not been consummated. Do you understand that?

Mr. Cory: Yes, sir.

The Court: And he may offer any explanation that he wants to give.

(Thereupon the Colloquy at the Bench Ended.)

The Court: Proceed with your examination, Mr. Cory.

Q. In your 35 years of practice of law, have you ever been reprimanded by the Circuit Court?

Mr. Walker: Now, I want to enter my formal objection.

3034 The Court: Overruled.

A. Yes. Thirty years ago I was.

Q. Will you explain what that was for?

A. For——

Mr. Walker: Object to that.

A. ——imprudence——

The Court: Overruled.

A. Imprudence in talking too much.

Q. Was that termed 'non-professional conduct'?

Mr. Walker: Object.

The Court: Overruled.

A. I don't think it was so considered, because in that proceeding, among other things, Judge Newell of Maysville said, 'To permit this proceeding to continue for another hour would be to tear down the

> temple of justice itself. The respondent'—meaning me—'Lester, is dismissed hence without day.' That's in the exact language of Judge Newell's opinion. He said, 'This prosecution is a political reprisal.' ".

As appears from the Appendix at p. 200a, the Government was permitted to put the question, "In your 35 years of practice of law, have you ever been reprimanded by the Circuit Court?" to which objection was made, overruled, and the answer given, "Yes. Thirty years ago I was." followed by the Government's question, "Will you explain what that was for?" to which objection was made and overruled and answer made, "Imprudence in talking too much," followed by the Government's question, "Was that termed 'non-professional conduct'?" to which objection was made and overruled and answer made, "I don't think it was so considered. . . ."

The only purpose of the Government in injecting this wholly irrelevant matter of a reprimand of petitioner as an attorney by a Circuit Court some thirty years before the date of trial was to discredit petitioner before the jury by attempting to impeach him by inadmissible evidence which petitioner never denied.

It appears from Appellants' Appendix at p. 199a that the trial court assigned for his reason for permitting the inquiry and requiring the answer was that the Government should be permitted to refute petitioner's claim of erudition. The trial court there said:

> "If there is something in the nature of a reprimand which was a matter of record, a matter of fact, you may inquire of it. He has testified as to his professional **erudition** and you have a right to attack it if you can, but not just that there was a proceeding at the bar."

Petitioner did not testify to his professional erudition. His testimony in this respect was only that he had been

admitted to practice law and the Court in which he had practiced. Merely stating that one has been admitted to the practice of the law and listing the courts and agencies before which that profession is practiced is a far call from a dissertation upon erudition of petitioner, even assuming he possesses such.

This question about a reprimand by a Circuit Court was not about a conviction of a prior crime. It had no relationship to the issues or to the matters for which he was on trial. It was for an occurrence not closely similar to the one on trial; and was for an occurrence many years past—some thirty years before.

It was grossly improper for the Court to permit the prosecutor to ask this question, and the Government had no support for such question. To refute his professional erudition would have no bearing on whether he had been in the continuous practice of law and the Government's question which followed, "Was it for non-professional conduct'?", Appellants' Appendix, p. 210a, shows beyond any shadow of a doubt that the Government wanted to show a prior wrongful act that occurred thirty years before and was for the sole purpose of attacking his character and to place him in bad odor with the jury.

At one point Government counsel admitted on page 199a of Appellants' Appendix that the question was to affect Lester's credibility by showing his integrity was bad.

Such practice upon the part of the Government which was permitted to occur here has but recently been condemned by the United States Court of Appeals for the District of Columbia in Lee v. United States, October 20, 1966, 368 F. 2d 834 at pp. 836-837. There the Court said at p. 837:

> "Long before **Walder** and **Tate**, the rules of evidence observed in this jurisdiction, as elsewhere, did not countenance the impeachment of witnesses by

otherwise inadmissible evidence directed to collateral issues. The policies served by these rules (i. e., the prevention of confusion and surprise) have peculiar force where the attempt is to discredit by means of purported misconduct short of a conviction. And, these traditional policies aside, there is something inherently repugnant about adducing evidence of alleged crimes from which appellant has already been given judicial deliverance, and which appellant, in or out of court, has never failed to deny."

The trial court permitted the Government to assault petitioner's general character although the legal principle is well established that in a criminal case the defendant's general character cannot be attacked by the Government unless evidence of his good character is first introduced by him. United States v. Harris, 1964, 4th Circuit, 331 F. 2d 185. Permitting the introduction of such evidence is reversible error as held in **Harris** which cites as its authority the Sixth Circuit 1963 case of United States v. Walker, 313 F. 2d 236, 238.

Both the **Walker** and **Harris** cases rely upon the decision of the Supreme Court of the United States in Michelson v. United States, 335 U. S. 469, 477, 69 S. Ct. 213, 219, 193 L. Ed. 168 (1948).

To compound the error the Court as appears at Appellants' Appendix at p. 234a charged the jury as follows:

"Now, there have been offered in this case—there were I believe one or two instances in which a **reference was made to the character of one of the defendants.** You are not to accept that as substantive evidence. It may be considered by you in determining whether or not you believe the guilt has been established to the exclusion of a reasonable doubt, but the evidence was given by witnesses, a witness or witnesses who have—don't presume to know anything

about the facts of the case, merely expressed an opinion."

In the case of Nichols v. Commonwealth, Ky. (1955), 283 S. W. 2d 184, 187, it was stated:

> ". . . It is the law of this jurisdiction that the Commonwealth may show for the purpose of attacking the credibility of a witness that he has been convicted of a felony and this, together with the punishment he received, may be brought out either by a court record or by the witness himself. White v. Commonwealth, 312 Ky. 543, 228 S. W. 2d 426; Bates v. Commonwealth, 260 Ky. 551, 86 S. W. 2d 322; Quillen v. Commonwealth, 275 Ky. 158, 120 S. W. 2d 1047. This rule applies as well to the accused as to an ordinary witness. Bolin v. Commonwealth, 206 Ky. 608, 268 S. W. 306; White v. Commonwealth, supra. CR 43.07, which is also applicable to criminal cases, provides the basis for the principle just stated."

To the same effect see Shirley v. Commonwealth, Ky. (1964), 378 S. W. 2d 816.

This rule of Kentucky law should be applied in a Federal Court sitting in Kentucky. United States v. Fay, 19 F. 2d 620 (1927). Rule 26, Fed. R. Crim. P. In United States v. Pennix, 313 F. 2d 524, 531 (1963, 4th), the Court used this language in respect to the attempted impeachment of a witness:

> ". . . In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude. By the prosecutor's one deft phrase, '30 times,' the jurors were informed that the defendant, whose credibility they must determine, had been arrested 30 times, perhaps more. This cross-examination could have had no pur-

> pose other than to degrade the defendant and to arouse the prejudices of the jurors against him."

The conviction in **Pennix** was reversed for the error of the trial court in permitting the improper cross-examination of defendant.

As the record of the instant case reflects, petitioners were along with all others accused of conspiracy and of the substantive offense of 18 U. S. C., § 242, and, as the Court of Appeals held, there is an inconsistency between the verdicts convicting petitioners of a conspiracy under § 371 and their acquittal of the substantive offense. The admission of this inadmissible evidence could well have been the sole reason and determining factor for petitioner's conviction and prevented him from having a fair and impartial trial.

In writing of a similar situation the Court of Appeals for the Sixth Circuit in 1956 in the case of Manley v. United States, 238 F. 2d 221, said:

> "Upon the entire record in the case, the acquittal on count four was inconsistent with conviction on counts two and three. This alone would not justify reversal. But, when an obviously inconsistent verdict as to different counts of an indictment or information is returned by the jury, but the trial court and the reviewing court should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error."

In **Manley**, the defendant had been indicted for post office offenses under Title 18, § 1001 and § 1711. He was convicted under § 1001 and acquitted under § 1711, which latter count charged him with converting to his own use $2,959.42, the property of the United States. Over objection of defendant he was required to answer that he had been discharged from his previous employment with Coca Cola Company because "I was short in my account."

The **Manley** case was reversed for a new trial upon the sole ground of the inadmissibility of such evidence on cross-examination to impeach the defendant as a witness.

The **Manley** case in the Sixth Circuit adopts the view of the Eighth Circuit that acts of misconduct not resulting in conviction of a crime are not the proper subject of cross-examination of a defendant as a witness, citing Little v. United States, 93 F. 2d 401, 408, and Eckert v. United States, 188 F. 2d 336, 26 ALR 2d 752. In the **Eckert** case the Government was permitted over the objection of the defendant to inquire of the accused whether he had been previously arrested on a Mann Act charge and upon his denial the Government was permitted to call a Government agent to testify that defendant had told him, the Government agent, that he had been so arrested. This was held to be error prejudicial to the substantial right of Eckert to a fair trial and his conviction was reversed. It also appears in the **Eckert** case that his co-defendant and wife, Margaret Eckert, was over the repeated objections of her counsel required by the Court to answer on cross-examination inquiries of Government counsel concerning her prior marriages and divorces. Such improper cross-examination was held reversible error, the Court there stating:

> "Obviously this cross-examination was for the purpose of discrediting the appellant Margaret Echert. It was not proper cross-examination, and the objections to it should have been sustained. See Gideon v. United States, 8 Cir., 52 F. 2d 427; Allen v. United States, 9 Cir., 115 F. 3, 11; Simon v. United States, 4 Cir., 123 F. 2d 80, certiorari denied 314 U. S. 694, 62 S. Ct. 412, 86 L. Ed. 555.
>
> Neither of the Echerts was on trial for matters complained of on cross-examination. Ben-
> Headnote 5 jamin was not being tried for the acts for which he was arrested in 1947, and

Margaret was not on trial because she had been divorced from two former husbands. It is an established rule that 'Acts of misconduct, not resulting in conviction of a crime, are not the proper subject of cross-examination to impeach a witness.' Lennon v. United States, 8 Cir., 20 F. 2d 490, 494; Little v. United States, 8 Cir., 93 F. 2d 401; Simon v. United States, supra, 123 F. 2d at page 85."

In the case of Sang Soon Sur v. United States, 167 F. 2d 431, 1948, the conviction of defendant for income tax evasion was reversed upon the sole ground that the trial court over the objection of defendant had permitted his character to be attacked when the defendant had not put it in issue. There the Court said:

"The admission of the evidence of independent crimes was error. Its admission cannot be justified under any of the exceptions to the general rule. We fail to perceive any relevancy between an evasion of the payment of income taxes and a conviction for the possession of opium. Such an error must have resulted in prejudice to appellant, more so perhaps, because of his nationality and alien status.

Appellant entered the trial with a presumption of good reputation. He did not put his reputation in issue. Crawford v. United States, 59 App. D. C. 356, 41 F. 2d 979. The introduction of evidence of the commission of independent crimes through the medium of the statement or confession cannot be justified on the ground that the relevant portions thereof could not be segregated from the irrelevant. Such a segregation could easily have been made without impairing the force and value of the statement relative to the income tax evasion. Here the effect of the challenged evidence could have had no other effect than to divert the minds of the jurors from the real issue and we are unable to say that it was not a de-

termining factor in the minds of the jurors in reaching their verdict of guilty. As was said in the case of United States v. Dressler, 7 Cir., 112 F. 2d 972, 977: '* * * it is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than he is guilty of the specific offense with which he is charged'."

To the same effect see the cases of United States v. Provoo, 215 F. 2d 531 (1954-2nd) and United States v. Tomaiolo, 249 F. 2d 683 (1957-2nd), where the convictions of the defendants were reversed upon the ground that the trial court had permitted their character to be attacked when the defendants had not put it in issue. In the **Provoo** case the Court said at pp. 536-537:

"It is true that a defendant who takes the stand subjects himself to cross-examination, within the limits of the appropriate rules of evidence, like any other witness, and may be cross-examined for the purpose of impeaching his credibility. In People v. Sorge, 301 N. Y. 198 at page 200, 93 N. E. 2d 637, it is stated that a defendant, like any other witness, may be interrogated upon cross-examination in regard to any vicious or criminal act of his life that has a bearing on his credibility. Whether this is a correct statement of the New York law we need not stop to consider. Concededly local rules of evidence are not controlling in criminal trials in the United States courts. Rule 26, F. R. Cr. P., 18 U. S. C. A. In the Federal courts there has been an impressive unanimity of view on the point before us. As generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes. In this circuit, apparently under the influence of the broader

New York rule, we have at times allowed impeaching questions as to misdemeanors, United States v. Cohen, 2 Cir., 177 F. 2d 523, 525, certiorari denied 339 U. S. 914, 70 S. Ct. 568, 94 L. Ed. 1340; United States v. Minkoff, 2 Cir., 137 F. 2d 402, 405; disbarment, United States v. Rubenstein, 2 Cir., 151 F. 2d 915, certiorari denied 326 U. S. 766, 66 S. Ct. 168, 90 L. Ed. 462, and even criminal acts which were not established by a judgment of conviction. United States v. Schiller, 2 Cir., 187 F. 2d 572; United States v. Gruber, 2 Cir., 123 F. 2d 307; United States v. Buckner, 2 Cir., 108 F. 2d 921, certiorari denied, 309 U. S. 669, 60 S. Ct. 613, 84 L. Ed. 1016; United States v. Frankel, 2 Cir., 65 F. 2d 285. Of these last, however, one may be explained as tending to show the necessary criminal intent, United States v. Schiller, see concurring opinion of Frank, J., 187 F. 2d at page 576, and two as proceeding on the theory that the door had been opened, United States v. Gruber, United States v. Buckner. Moreover, only two of the cases, United States v. Schiller and United States v. Cohen, were decided after the promulgation of the Federal Rules of Criminal Procedure had lessened the desirability of following New York decisions. Of these, Schiller, as noted, is explicable on other grounds, and Cohen (where this point received cursory treatment) involves no clear conflict with the majority rule. On the strength of this meager authority we cannot say that we are committed to a position so radically at variance with that of the other circuits as to allow this examination.

Even if the course of our precedents was clearer, we would have difficulty espousing the Government's position. Under F. R. Cr. P. 26 we are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' In proposing the rule, the

Notes of the Advisory Committee remark that: 'Since all federal crimes are statutory and all criminal prosecutions in the federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.' We have set forth above the interpretation of the common law adopted by the overwhelming majority of federal courts. As for experience, Wigmore, Evidence (3d ed.), §§ 980 (a)-983 presents numerous examples of the abuses resulting from unrestrained inquiry into a witness's history, suggests that the inquiry be confined to the trait of veracity, § 982 (1), and offers the suggestion that a defendant-witness is entitled to even greater protection, in order to prevent unfair prejudice. §§ 891 (3), 983 (4), 2277 (4). As for reason, we do not conceive that inquiry into every accusation of criminal or vicious conduct will further the search for truth. Where, as here, the defendant's general character has not been put in issue, it is difficult to justify any examination other than into the trait of veracity. No authority has been cited which suggests that homosexuality indicates a propensity to disregard the obligation of an oath. The sole purpose and effect of this examination was to humiliate and degrade the defendant, and increase the probability that he would be convicted, not for the crime charged, but for his general unsavory character. Permitting it was error.

The error was plainly prejudicial. Indeed we can conceive of no accusation which could have been more degrading in the eyes of the jury nor more irrelevant to the issue of treason on which he was being tried. On the main appeal the judgment must be reversed and the cause remanded for a new trial. This disposi-

tion makes unnecessary consideration of the other alleged errors in the course of the trial."

And in United States v. Tomaiolo, 249 F. 2d 683, at p. 689, the Court said:

> "Nor did the defendant by testifying put his general character in issue. By taking the stand the defendant elected to be treated as any other witness, *viz.* he laid his credibility open to attack. Although a prosecutor may bring in evidence as to the truth and veracity of a defendant upon cross-examination, he is not at liberty to attack his general character. The general character of a defendant is put in issue only when he calls witnesses to testify to his reputation in general. Michelson v. United States, 1948, 335 U. S. 469, 476 et seq., 69 S. Ct. 213, 93 L. Ed. 168; Richardson, Evidence, § 154 (8th Ed. 1955 Prince). The testimony of the defendant about his parole, and the circumstances thereof, did not 'open the door' for the prosecutor's questions. United States v. Provoo, supra, 215 F. 2d at page 535."

Such cross-examination permitted by the Court in this case has been in Wigmore on Evidence, 3rd Ed., § 983, at p. 551, characterized in this language:

> "The ordinary instincts of decency, not to say courtesy, are violated by such examinations, and every new instance makes us more sodden to the spectacle and tends to bring us towards the same level of degradation. It is the difference between the hunt and the slaughterhouse. One may well enough find sport in stalking the lion in the desert or beating the bush for the tiger, because there is a risk for the hunter which dignifies his sport, and there is a rapacity and a destructiveness in the hunted which leaves no room for sympathy; but the process of cutting the throat or knocking the head of

a sheep or an ox penned in the shambles is both safe and brutal, and is to be justified only on the ground of its absolute necessity. The hunting down of a fleeing desperado, or the ensnaring of a chief of counterfeiters by the craft of detectives, is a process which does not violate instincts of fairness or principles of justice. But the ruthless flaying of personal character in the witness-box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—, but it has often not the slightest justification of necessity. Severe limits must be put to such conduct."

As the Court said in United States v. C. L. Guild Construction Co. (1961 D. R. I.), 193 F. Supp. 268, at p. 272:

"Where it cannot be clearly said that a prejudicial statement or question did not have a substantial influence on the judgment of the jury, it is the duty of the Court to set aside a conviction and grant a new trial. Kotteakos v. United States, 1946, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557; Mickler v. Falls, 5 Cir., 1957, 243 F. 2d 515; Nalls v. United States, 5 Cir., 1957, 240 F. 2d 707; Helton v. United States, 5 Cir., 1955, 221 F. 2d 338; Oliver v. United States, 6 Cir., 1953, 202 F. 2d 521; United States v. Levi, 7 Cir., 1949, 177 F. 2d 827; Holt v. United States, supra; Pierce v. United States, supra; Middleton v. United States, 8 Cir., 1931, 49 F. 2d 538; C. M. Spring Drug Co. v. United States, 8 Cir., 1926, 12 F. 2d 852."

In Kotteakos v. United States, supra, the Supreme Court said at pages 764-765 of 328 U. S., at page 1248 of 66 S. Ct.:

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should

stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The complained of cross-examination of petitioner was, over his objection, permitted by the trial court for no purpose other than to attempt to show a criminal disposition of petitioner and such practice by the Government was a denial to him of due process of law under the Fourteenth Amendment as suggested by the Chief Justice in his dissenting opinion in Spencer v. Texas, No. 68, Bell v. Texas, No. 69, January 23, 1967, reported in 35 United States Law Week 4164 at pp. 4169-4170, citing Lovely v. United States, 169 F. 2d 386, 389 (C. A. 4th Cir., 1948), Michelson v. United States, 335 U. S. 469, McCormick, Evidence, § 157 (1954), and Wigmore, Evidence, §§ 193-194 (1940).

A reprimand by a Circuit Court for petitioner's "imprudence in talking too much" was neither a felony, nor a misdemeanor, nor a contempt; it was injected into the case for the sole purpose of attempting to degrade petitioner and could not possibly have had any probative value to show a tendency to commit the offenses laid in the indictment. It was a most unfair attack and an attempt at character assassination upon petitioner who had not and did not put his character in issue. And this is precisely what the prosecution is not allowed to show in a criminal case. See Lovely v. United States, 169 F. 2d 386, 388

(4th Cir., 1948). The rebuke or reprimand by the Circuit Court more than thirty years before the day of trial has no similarity, or connection even remotely, with the charges made in the indictment, and was highly prejudicial to the substantial rights of petitioner, Lester.

**Petitioners' substantial rights were prejudiced through the fatal error of the trial court in not properly instructing the jury on the question of the wilfulness necessary to be proven in connection with the offense denounced by Section 242, Title 18, U. S. C.**

This question was presented in the Petition for Writ of Certiorari, pages 51-55. However, this error complained of is so fundamental and prejudicial to the substantial rights of these petitioners that we wish to again call it to the attention of this Court. And for the further reason that the **Harvard Law Review**, Volume 80, hereinafter cited, reviewing and interpreting the **Price** and **Guest** cases was not available at the time the Petition for Writ of Certiorari was filed.

The instructions of the trial court to the jury did not comply with the law laid down by this Court in the case of Screws v. United States, 1944, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330, and as so interpreted by the case of Pullen v. United States, 1947, 164 F. 2d 756.

Nowhere in the Court's instruction was the jury told that the word "wilful" implied more than merely "a conscious purpose to do wrong" on the part of petitioners, but to convict them it was necessary for the jury to find that the petitioners had the specific purpose and intent to deprive Ratterman of a constitutional right.

In **Harvard Law Review**, Vol. 80, November 1966, No. 1, Hon. Archibald Cox, former Solicitor General of the United States, in his analysis and interpretation of the

cases of United States v. Price, March 28, 1966, 383 U. S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152, and United States v. Guest, March 28, 1966, 383 U. S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170, at pages 156-157 said:

> "These decisions resolve two areas of confusion in favor of maximum federal jurisdiction . . . The practical effect of these two extensions of federal jurisdiction may be severely limited, however, by the prerequisite to conviction under sections 241 and 242 of proof of a specific intent to interfere with the constitutional right. 13"

Note 13, page 157

> "Both statutes have been challenged as unconstitutionally vague. The Court sustained § 242 against that attack in Screws v. United States, 325 U. S. 91 (1945), focusing on the element of wilfulness required by the statute. In **Price**, the Court adopted the reasoning of four Justices in United States v. Williams, 341 U. S. 70 (1951), that a conspiracy requires similar willful conduct, so that § 241 is not unduly vague if there is an allegation of specific intent to deprive someone of the federal right involved."

Petitioners believe that the law as written in the **Screws** case has not been relaxed and that it is more than an empty meaningless opinion. Petitioners are entitled to its benefits and protection as long as it remains the law. The Court did not charge the jury as required by **Screws**, that it was not sufficient that petitioners had a generally bad purpose. The Court did not charge as Screws also requires that "To convict it was necessary for them to find that petitioners had the purpose to deprive Ratterman of his constitutional rights under the Fourteenth Amendment to the United States Constitution." We submit that petitioners' substantial rights have been violated and that they are entitled to a new trial consistent therewith.

## CONCLUSION.

It is accordingly urged that upon consideration of this Petition for Rehearing, the Petition for Writ of Certiorari be granted.

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### Certificate of Counsel.

J. Leonard Walker, counsel for petitioners, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the provisions of Rule 58, Sub-section 2, of the Revised Rules of the Supreme Court of the United States.

J. Leonard Walker,
Counsel for Petitioner, Lester,
and one of the counsel for
Petitioner, Buccieri.